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October 31, 2016

Chris Cole, Secretary
Vermont Agency of Transportation
National Life Building
Montpelier, VT 05633-5001

Re: Middlebury Main Street and Merchants Row Bridge Replacement WCRS 23

Dear Secretary Cole:

I write to you on behalf of residents of and property owners in Middlebury to address project WCRS-23, which has been proposed to remedy the two failing State-owned highway bridges on Merchants Row and Main Street. The existing administrative record demonstrates that municipal, State and federal decisions to date have been based upon substantially incomplete and incorrect information, errors of law, and superseded project plans. Safe, feasible, lower-cost alternatives with reduced or no impacts on the environment and on historic resources have been ignored altogether or unreasonably rejected as a result of these errors. This record fails to provide reasonable assurance to the public and to my clients that severe and unnecessary risks of harm to their lives and their property and to the natural and cultural resources of the State have been considered. This record also demonstrates prejudicial departure from the intent of Congress and of the Vermont legislature.

I write to ask that you and the Federal Highway Administration update, supplement and correct the record, and reopen or (in some instances, undertake for the first time) the lawfully required National Environmental Policy Act, §4 (f), Endangered Species Act and National Historic Preservation Act review process before any further planning occurs or construction commences. An Environmental Impact Statement, findings by the Secretary of Transportation and the Fish & Wildlife Service that no prudent and feasible alternatives exist, and additional consultation under the NHPA are required. Since prudent and feasible alternatives do exist, ultimately, if the lawfully required procedures are followed, we expect that the project will not receive approval for federal funding.

The record of the § 4(f) and SAFETEA-LU determination, of the Categorical Exclusion from National Environmental Policy Act decision, of the Endangered Species Act process, and of the NHPA § 106 determination, demonstrate the following errors and omissions:

1. AoT and the VHB consulting firm have consistently stated that track lowering or bridge raising so as to provide 23 feet of clearance is required to meet state law,

which applies AREMA standards, and only by special exception granted by the legislature can 21 feet be used. (12/19/13 Narowski to Hake letter and memorandum; VHB 7/23/13 Alternatives Report) This assertion is incorrect, as discussed below.

2. AoT and VHB have repeatedly stated the project will improve rail safety in Middlebury but reconstructing the existing bridges would not. (12/19/13 Narowski to Hake letter and memorandum; VHB 7/23/13 Alternatives Report). This too is incorrect, as discussed below.

3. According to AoT, the project will require or involve:
    a. No "substantial planning, resources or expenditures;"
    b. No significant alterations in land use;
    c. No state rivers or stream permits;
    d. No 401 Water Quality Certification or Army Corps of Engineers permit;
    e. No stormwater discharge permit;
    f. No flood plain encroachment;
    g. No impacts on groundwater or surface water;
    h. "No concerns" about endangered species;
    i. No hazardous, residual or petroleum-related waste in the project area;
    j. Adverse impact on historic resources -- but no need for SHPO coordination and consultation and no need for § 4(f) determination of no prudent and feasible alternative;
    k. "No" "Neighborhood and Community Concerns;" and
    l. "No" "Effect on local business" except "temporary construction delays."

(12/19/13 Narowski to Hake letter and memorandum, VHB 7/23/13 Alternatives Analysis) Each one of these assertions is incorrect, as discussed below. Each one of these impacts would be completely avoided or readily addressed by bridge reconstruction, which would require no Environmental Assessment or EIS and would not require any § 4(f) or Endangered Species Act determinations.

4. The record also is notable for its adoption of a Categorical Exclusion while failing to address the FHWA regulation governing Categorical Exclusions – because that regulation explicitly prohibits use of CEs where projects involve "Construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions." The regulation also prohibits use of CEs where an otherwise excluded type of project would in a particular case have significant environmental impact, as here. See the discussion below.

5. The record adopts a *de minimis* exception to § 4(f) -- but the record completely ignores, and violates, the FHWA regulations governing § 4(f) *de minimis* determinations. See the discussion below.

6. The record also is remarkable for its failure to address state and local land use law and plans -- a key factor under NEPA and also necessary to any realistic discussion of project development and schedule. These are state-owned bridges. The project

requires a conditional use permit under 24 V.S.A. § 4413(a) and the Middlebury Land Use Ordinance as to the location, size, bulk, landscaping and traffic impacts. This too is discussed below.

7. Much of the information relied upon in the record also has been superseded by changes in the plans, and now is seriously incomplete. This too addressed below.

1. <u>AREMA standards do not require 23-foot or 21-foot clearance for this project; the purpose of the project is to protect public safety by repairing two hazardous bridges and AREMA and state law allow for that repair so long as no reduction in clearance results.</u>

The hundreds and hundreds of pages we have obtained by Public Records Act and Freedom of Information Act requests repeatedly rely upon the assertions that state law requires compliance with the 23-foot AREMA standard, and that recent state legislation has reduced the 23-foot AREMA standard to 21-feet. Repeated government decisions have been based on these erroneous assertions.

For example, the documentation of the Categorical Exclusion from NEPA review states that "track lowering is required to meet state and federal requirements for vertical clearance." (12/19/13 Narowski to Hake letter). The CE decision was based on this assertion.

A more recent example is the action of the Middlebury Selectboard. On February 23, 2016, it voted to enter into a variance agreement with AoT based on the same understanding. The February 23, 2016 Minutes explain: "… Vermont Secretary of Transportation Secretary Chris Cole… has agreed to support the 21' clearance, which is two feet lower than the standard adopted by the state." On this basis, the Selectboard voted to sign the waiver agreement.

Not a single document we have found quotes or reflects what the AREMA standard actually says. Not a single page refers to what are actually the relevant sections of state law.

In fact, state and federal law does not require 23 feet or 21 feet of clearance:

- First, as you will see from the attached excerpt from the AREMA manual, the *23-foot standard does not apply to reconstruction or alteration of existing bridges*. The 23-foot AREMA standard applies only to new construction. A *different, and more flexible, standard* applies to reconstruction or alteration of existing bridges, as discussed below.

- Second, the statute allows the Transportation Board to grant waivers of every AREMA standard, whether it is the new construction standard or the reconstruction standard.

●Third, the statute states that notwithstanding the AREMA standards, *any bridge or other structure that is currently in lawful use may be repaired in a manner that does not meet AREMA standards*, provided that clearances are not *further reduced*.

●Fourth, the 2015 amendment to § 3670 creates an exemption from AREMA standards – but does not require this or any project to produce a 21-foot clearance if AREMA does not do so.

Here is what section 3670 of Title 5 states:

(a) No person shall construct, alter, or permit construction or alteration of a railroad track, railroad bridge, or structure over or adjacent to any railroad track unless the clearances provided equal or exceed the minimum standards set forth in the American Railway Engineering Association's Manual for Railway Engineering, as in effect at the time work begins.

(b) Subject to the approval of the transportation board, a variance from the standards established by this section may be established by written agreement of the agency of transportation, all involved railroad companies and any affected municipality.

(c) If the parties are unable to agree on a variance request, the transportation board, after notice and hearing, may grant a variance from the standards established by this section if the board determines that:

(1) the agency of transportation, all involved railroad companies and any affected municipality have had an opportunity to review and comment on the variance request;
(2) granting the variance will not significantly impair the safe, efficient, continuous movement of freight, passengers and railroad equipment on the state's railroad system or the safe, efficient performance of railroad maintenance operations; and
(3) the costs and impacts associated with meeting the clearance standards established by this section would exceed any public benefits reasonably likely to flow from adhering to such standards.

(d) Notwithstanding this section, tracks, bridges and structures lawfully in existence (or already under construction) on the effective date of this act may continue to be used and repaired, provided that clearances are not further reduced.

The AREMA standard is found in Part 1 of chapter 28 of the American Railway Engineering and Maintenance-of-Way Association Railway Engineering Manual. Part 1 begins with Section 1.1, which includes this statement:

a. The clearances shown are for tangent track and new construction. Clearances for reconstruction work or for alteration are dependent on existing physical conditions and, where reasonably possible, should be improved to meet the standards for new construction.

Section 1.7 is captioned "Highway Structures Over Railroads." It states "For overhead structures over railroads, refer to Figure 28-1-6. The information found in Section 1.1 will apply to this illustration." Figure 28-1-6 shows a 23-foot distance from top of rail to lowest component of structure. It also requires 25 feet from the center of the rail to each wall. I enclose copies of these pages.

The only reasonable reading of the AREMA manual is that the 23-foot vertical clearance standard for highway structures over railroads, and the 25-foot horizontal clearance standard for highway structures over railroads, do not apply to reconstruction work or for alterations of structures. Clearances for reconstruction work or for alteration are dependent on existing physical conditions and, where reasonably possible, *should be* improved to meet the standards for new construction – but there are no black-and-white standards or mandates.

The AREMA manual makes sense. If repairs or reconstruction had to either meet current standards or not be undertaken, regardless of the cost of meeting current standards and regardless of physical conditions at the site, there would be many repairable structures that would be left to deteriorate. Grave danger to the public would result.

Subsections (b) and (c) of the statute authorize the Transportation Board to waive any standard. This too makes sense, for the same reasons. If the AREMA 23-foot and 25-foot standards *did* apply, the Board could grant a waiver. Note that the proposed project would fall short of the 25-foot horizontal clearance standard. A waiver of the horizontal clearance standard would be needed from the Transportation Board for the current version of the project if the "new construction" AREMA standard does apply. No waiver has been applied for.

Subsection (d) states, however, that none of the AREMA standards applies to repairs.

The fundamental purpose of the project, since the 1990s, has been the repair of two dangerous bridges. A memorandum written by the former Town Manager explains the "historical context and need for this project." The memo explained that the bridges "have been rated poor and in need of replacement for decades."

> The bridges are now in a state of rapid deterioration with concrete chucks falling on the track on a regular basis and gaping holes appear regularly in the sidewalks, large enough to cause severe injury or worse to pedestrians and vehicles. These holes are patched by VTrans District 5 personnel using metal plates, plywood, and other materials that may be at hand.

After explaining that the project's goal was bridge repair, Mr. Finger's memo explained that the project became immensely more complicated, four times more expensive, and far

more time-consuming to plan and construct when the State proposed, in 2002, using the bridge-repair project to increase the clearance distance over the track. The State represented this change as "necessary" according to the memorandum. Then, in 20012, the tunnel idea was added on, again with the intent of obtaining the allegedly necessary increased clearance by lowering the track. One paragraph of Mr. Finger's memorandum states:

> By any measure, this project which initially seemed like a relatively simple installation of precast concrete components, is far more complex not only in terms of actual construction but in terms of maintaining public access to downtown, satisfying public transit needs, keeping public events and performances alive and well and maintaining an acceptable quality of life for those who live and work in close proximity.

Mr. Finger concluded his memorandum with this sentence: "The bridges are much closer to collapse than ever before." William Finger memo 1/6/16 (attached). I attach page 6 of AoT's February power point presentation to the Rail Council. This page consists of photographs showing the horrendous condition of the bridges, and surface water ponding within the track.

Of course, the presence of concrete chucks on a rail line poses enormous public safety risks, both to the personnel on the train and to the public. The train carries large quantities of gasoline under those bridges every day. The last gasoline tanker derailment in Middlebury posed potentially catastrophic risk to the people and properties in the town.

The public safety problems Mr. Finger summarized were memorialized in the formal "Purpose and Need Statement" that is found in the administrative record. The "Purpose and Need Statement" for the project is "To address the structural deficiencies and existing pedestrian facilities of two roadway bridges in downtown Middlebury where Main Street and Merchants Row span the Vermont Railway, Inc. track." Mr. Finger's memorandum lays out the "structural deficiencies" and "pedestrian facilities" that the project is intended to address.

Act 40 did not amend subsection (d). If the legislature had intended to mandate a 21-foot clearance even for repairs of bridges lawfully already in existence, as these two bridges are, the legislature would have amended subsection (d) as well. But the Act created an exemption, not a new mandate. Again, allowing repairs that do not meet current standards makes sense, because otherwise some repairs that are needed to protect public safety would not happen.

The record demonstrates that: a) the Main Street and Merchants Row bridges over the tracks need to be repaired in order to protect public safety; 2) the Town's intention has been to accomplish these repairs in order to protect the public; 3) the administrative record examines various ways to accomplish the repairs; and 4) so long as the repairs do not *reduce* the clearance over the tracks, state law allows them.

The record also demonstrates that the documents which purport to satisfy the requirements of NEPA, § 4 (f) and the NHPA incorrectly informed decision-makers, the town, and the

public that complying with the AREMA 23-foot clearance standard was necessary, and then in 2105 that complying with the 21-foot alternative was necessary, and that any alternative that does not meet one of these standards this must be rejected.

Before any further decisions are made, and before construction commences, corrected consideration of alternatives under § 4(f), NEPA and the NHPA must be conducted, and the decisions then must be founded upon the corrected record.

2. **Bridge repair would quickly and economically address the critical bridge safety problem without introducing new safety concerns, uncertainty and long delays.**

As Mr. Finger's memorandum notes, the use of precast concrete components to repair the bridges is a simple solution that could have be readily implemented. Use of precast concrete components to repair the bridges would cost a fraction of the proposed tunnel project. See the attached letter from Matthew LaFiandra. The total project cost would be about $5 million. As Mr. LaFiandra explains, one bridge could be replaced while the other bridge remains in service, avoiding total shutdown of traffic and disruption of many businesses and lives. And the construction time needed for two bridges would be about two to three *months*, total – not four *years*.

Fourteen years have elapsed since 2002, when the State first proposed using this urgent bridge repair project as a means to achieve 23-foot clearance and provide a route for double-stacked freight cars through western Vermont. The present project's huge cost and its predicted four years of construction have triggered "alarm and contention in the community" and the town has now entered "a period of political uncertainty." Over $2.8 million has been spent so far, with nothing to show for it, while the bridges continue to deteriorate, as Mr. Finger's memorandum points out. For less than what has been spent on consultants thus far, one of the two bridges could have been completed.

We understand the argument that lowering the track would allow for double-stacked freight cars, but that argument does not justify departure from required legal processes, particularly where risk to the public could be quickly mitigated while allowing time to carefully and legally consider a full range of reasonable alternatives -- which has yet to occur and which is discussed further below.

There is no urgency to obtaining a larger clearance. Your February 5, 2016 letter to the Town acknowledged that double-stacked freight cars will not be able to use a lowered railway track in Middlebury until five other clearance limitations between Rutland and Burlington are remedied. Your letter stated that the other five restrictions present less daunting challenges than the Middlebury bridges – but we understand it could be many years before the rest of the corridor could accommodate double-stacked cars.

The record contains no studies, by VTrans, another State agency, or any private parties, that show a demand or benefit for intermodal containerized freight capacity in Vermont, much less on the Class III short-line in the Champlain Valley. Without any demonstrated demand for through-traffic, the argument that the bridge must be designed for the alleged

AREMA clearances to allow the passage of double-stack container traffic and/or triple-deck auto-carriers (i.e. AutoFle) is not a reasonable basis upon which to rest rejection of all other alternatives to addressing the pressing safety issues in Middlebury.

I am confident that AoT's experts agree that replacing the two existing bridges is *immediately* attainable. What is not immediately attainable is repairing the two bridges while also creating a 23-foot or 21-foot clearance to allow for double-stacked freight cars.

The existing record fails to take into account some of the risks of lowering the track. Review of the record, and visual inspection of the track through Middlebury, by our consultants revealed that the existing rail bed already is subject to infiltration of water from the ground water table and that the existing operator of the railway has allowed the existing drainage facilities to fall into disrepair, without maintenance, for years. See Matthew Murawski's report, attached, and the powerpoint photographs attached.

As Mr. Murawski explains, if the track were to be lowered closer to the ground water table, the lowering will increase water infiltration and create additional potential for rail bed deterioration and train derailment from deterioration and icing. Proper maintenance could avoid these problems – but that is equally true at the existing grade, and the maintenance has not occurred.

According to our consultants, lowering the track also will require excavation of large amounts of soils that are contaminated with benzene, arsenic and other toxic chemicals. Unless the excavation process is physically isolated from the community, it will expose residents, business employees and visitors to potentially dangerous levels of these chemicals in the resulting dust.

The AoT team that met with the Selectboard on October 11, 2016, acknowledged, in answer to questions asked by one of my clients, that physical isolation of the public from contaminated construction dust will require erection of a tent over the entire site during construction. It will also require use of personal protective devices by all workers, and restriction of the vehicles that transport the soil to other locations. These measures will, obviously, drive up the cost and increase the duration of the construction process. The existing schedule and cost estimates have not taken these factors into account.

The groundwater at the site is contaminated as well, according to AoT and ANR records. Our consultants report that the excavation to lower the track likely will increase the flow of contaminated groundwater onto the site. This will increase the quantity of contaminated groundwater flowing from the site to neighboring properties and the Otter Creek. It may also result in greater quantities of contaminated surface water that will need to be disposed of. The administrative record, thus far, depends on discharge of surface water, including contaminated surface water, from the site into the Otter Creek. Yet the permitting process falsely asserted that there are no hazardous wastes at the site and there will be no such impacts.

The administrative record contains no analysis of the impact that lowering the track will have on air quality, groundwater or surface water, nor any discussion of how these impacts need to be mitigated, or the cost or effectiveness of mitigation.

The State and the Town hopefully can address these issues without taking another 14 years, but it will take time. The two bridges need repair now, and can be repaired now without lowering the rail bed closer to the groundwater table and exacerbating the problems caused by the existing contaminated soils and contaminated groundwater.

3. **The administrative record demonstrates that NEPA, § 4(f0 and NHPA decisions were based upon erroneous information.**

The project involves substantial planning, resources or expenditures. The CE documentation from Narowski to Hake states that the project does not involve "substantial planning, resources or expenditures." Substantial planning, resources and expenditures have *already* gone into this project and there is much more to come – as witnessed by the thousands of pages of reports from consultants, the past team of engineers engaged by the Town and the State, the team of engineers currently engaged by the State, the dozens of public meetings that have been held, and the millions of dollars already spent on planning the project. Future planning, future commitment of resources and then actual construction expenditures will be much larger. The cost of the project is now estimated to be over $50 million.

Significant alterations to land use will occur. The CE documentation from Narowski to Hake states that the project involves no significant alterations in land use. That would be true only if the project consisted of replacing the existing two bridges, without adding the tunnel and without lowering the track. The changes in land use for the currently proposed project undoubtedly are significant as that term is defined by Council on Environmental Quality regulation 40 CFR § 1508.7(a), and the following subsections of § 15087(b):

●§§ 1508.7(b)(1), (3) & (8) – *both adverse and beneficial impacts of significance; proximity to historic resources; adverse impacts on listed historic structures*. The tunnel will be a massive concrete structure in the middle of downtown Middlebury, which will will remove from public view both the historic railroad grade and its historically significant stonework. A planned beneficial impact is the pedestrian area is planned for the surface of the tunnel, where the open, historic railroad grade now is. The entire project area runs from the Cross Street bridge, through the downtown, and then west of Main Street, as shown in the attached exhibit (10/11/16 AoT powerpoint) showing the project area. The historic visual landscape of the Town will be altered forever.

●§1508.7(b)(2) – *public health and safety*. The project will trigger exposure of the public, adjoining landowners and the Otter Creek to soils, dust and/or groundwater contaminated with toxic chemicals, as discussed above.

●§1508.7 (b)(4), (b)(5) – *highly controversial and uncertain nature of the project and its impacts*. There is substantial uncertainty and dispute about the size, nature and effects of the project. Its size nature and effect have changed substantially over time. Dozens of

public meetings and thousands of pages of reports have increased, not lessened, the uncertainty. As of the last presentation to the Select Board, a few weeks ago, the project has changed yet again – now incorporating town lands that were never before a part of the project.

The project is so complex, and its consequences are potentially so severe, that a large engineering team has been assembled to manage it. Even that team appears to be suffering from overload. At the recent meeting with the Select Board, the team leader was asked about the present status of the flood wall. He was unaware that the project includes a flood wall. A consultant spoke up and explained that while a flood wall is needed, there exist no drawings of it yet.

It has been three years since AoT and VHB disclosed to the public that the flood wall will be needed. The lowering of the track will cause the floor of the tunnel to be well below the 100-year flood level, with little separating the tunnel from the Otter Creek. A 100-year flood could inundate the tunnel and the foundations of the buildings that adjoin the railroad right of way. AoT's and VHB's Section 106 Determination of No Effect, dated 9/6/13, at p.7, stated that "approximately 860 feet of the proposed finished track elevation south of the low point of the proposed vertical alignment will lie at an elevation below that of the Zone AE special Flood Hazard Area…. Accordingly, an earthen berm and a concrete wall with a top elevation of 350.2 feet… will be constructed between the railroad tracks and Otter Creek south of Merchants Row to mitigate the risk of flooding within the sag of the track profile." The Section 106 report described the proposed berm as extending 300 feet south of the Cross Street bridge pier and the concrete wall as extending 500 feet from the Cross Street bridge to the Merchants Row bridge, 15 feet west of the centerline of the track.

A later VHB report, in 2014, however, stated that a different plan had been arrived at, using a u-wall structure. No details were provided at that time, and none have been provided since that time.

At this time, neither AoT's project management team nor any member of the Selectboard or any member of the public knows what the flood wall will consist of, or where it will be located, or how long the downtown will be vulnerable to a 100-year flood, or what local, state or federal permits will be needed for the flood wall.

●§ 1508.7(b)(5), (b)(9) – *highly uncertain effects, effects on endangered species*. The Indiana Bat is listed as endangered. Its presence in downtown Middlebury has been a matter of public record for more than five years. At the recent team presentation to the Select Board, however, the team informed the Board for the first time that construction of the project may impinge upon this endangered species' habitat, and that the consultation process has been started with the Fish & Wildlife Service.

●§ 1508.7(b)10) – *whether the action threatens violation of federal, state or local environmental protection laws or requirements.* Section 4413(a) of Title 24 authorizes towns to regulate the location, size, bulk, landscaping and traffic impacts of state-owned or state-operated land development. Sections 510 and 610, and associated sections, of the Middlebury zoning ordinance require that a conditional use permit be obtained for these

aspects of the project. Going forward without that review "threatens a violation of… local law or requirements imposed for the protection of the environment." The project also would constitute a "violation of.. state law… imposed for protection of the environment," as discussed next.

State rivers or streams will be impacted and state permits will be needed. The CE and §4(f) documentation states there will be no impact on or consultation needed about, rivers and streams. But the record demonstrates that a berm is planned for the area within the state-designated river corridor. The record includes a request from VHB to the Agency of Natural Resources for a ruling that the berm does not require authorization under the stream alteration General Permit despite the fact – as admitted by VHB -- that the berm would be constructed within the river corridor. The stream alteration statutes define "person" to include the State of Vermont, and these statutes prohibit any person from establishing or constructing a berm within the river corridor without a permit from the Secretary of ANR 10 V.S.A. § 1021. It would be unlawful to construct this project, as planned at the time of the CE determination and, as I understand it, as planned today, without that permit.

The form used by AoT for its CE determination appears to assume that only consultation, and not permitting, is needed for state highway projects affecting rivers and streams, in reliance on 19 V.S.A. § 10(12). This is incorrect. As just noted, the statute includes the State of Vermont within the definition of "person." There is a general duty to consult whenever streams or rivers are involved, as set forth in Title 19, but that general duty does not supplant the specific duty to obtain a stream alteration permit when § 1021 applies.

Proceeding forward with this project at this time would be a "violation of.. state law… imposed for protection of the environment," within the meaning of the § 1508.7(b)10) of the NEPA regulations, and therefore the land use change is significant -- as well as being independently unlawful under state law.

Water Quality Certification and Army Corps of Engineers permitting may be required. The CE determination includes assertion that no Water Quality Certification and no Army Corps of Engineers permitting are required. Under § 401, a WQC is required prior to the issuance of any federal permit that may involve a discharge into the Otter Creek, including any an Army Corps of Engineers § 404 permit for work within the ordinary high water mark of Otter Creek.

The record includes both a proposed flood wall adjacent to the Otter Creek and a temporary access road between the flood wall and the Otter Creek. Review of the record by our consultants revealed that parts of the access road and perhaps parts of the flood wall may be within the ordinary high water mark. Those plans would have required ACOE permitting and § 401 certification.

Subsequently, in 2014, the plans were changed. The existing plans, according to the October 11, 2016, presentation to the Selectboard, continue to include a flood wall but those plans have yet to be drawn up. There are in existence at this time no engineering drawings, diagrams or narrative which disclose the location or nature of the flood wall.

Therefore, at this time, neither the State nor the FHWA can determine that Water Quality Certification or a § 404 permit will be required for the flood wall. The same is true of the temporary access road, which has been proposed to be constructed between the flood wall and the Otter Creek.

A storm water discharge permit will be required. The CE administrative record asserts that no new storm water discharge permit will be required. If this refers to a construction general permit or multi-sector general permit, there is no imaginable lawful basis for the assertion. In Vermont Railway's dispute with the Town of Shelburne, the railway and the State agreed that both permits are needed. These are federal permit programs administered by the state and are not preempted.

If this refers to an operational permit, I understand the argument to be that operational permits for railway construction are preempted by the Interstate Commerce Termination Act. But reliance on the ICCTA to justify exemption from state stormwater permitting, for this project, is an error of law. The purpose and need for this project is to address the failing, dangerous *highway* bridges owned by *the State*. The purpose of the ICCTA, and its jurisdictional limits, are confined to regulation of *railroad* projects conducted by *interstate railroad corporations*.

If this were a railroad project being conducted by Vermont Railway, the project would have to go through federal environmental review as required by the Surface Transportation Board's regulations, including compliance with NEPA. Section 4(f) would still apply, as would the NHPA.

It is only by adding railway bed changes to the project that the State has introduced a railway element to it. Even if this were considered a railway project, *the State owns the railbed*, not the Vermont Railway. The decisions of the courts and of the Surface Transportation Board itself agree that the ICCTA preemption does not apply to states when the states are managing or constructing state-owned railroad facilities. Since the STB by statute is the agency which has been delegated by Congress the duty to apply and interpret the ICCTA, the STB's rulings that preemption does not apply to the states when the states are managing or constructing state-owed rail facilities should dispose of this objection out of hand. Unfortunately, the federal administrative record and ANR's records assume the contrary. ANR has wrongly informed AoT that no operational stormwater permit is needed. The record from ANR indicates that ANR relied on a legal position on preemption submitted to it by Vermont Railway's lawyer -- without the benefit of briefing from the Attorney General's Office or notice to or input from the public.

There may be flood plain encroachment. Executive Order 11988 requires all federal agencies to avoid development in the floodplain. Both the Army Corps of Engineers' and the Federal Highway Administration's regulations incorporate this requirement. See, e.g. 23 C.F.R. § 650.113, barring use of federal funds for FHWA-funded projects in a floodplain unless there is no practicable alternative, and requiring a finding to that effect.

Parts of the project that were subject to the CE determination, such as the temporary access road, would have encroached on the 100-year floodplain, according to our consultants.

Because of the unknown location and nature of the flood wall for the current version of the project (see above) and because of uncertainty as to the location of the access road between the flood wall and the river in the current version, there is no way for AoT or FHWA or any consultants to determine whether this continues to be true. If flood plain encroachment would occur, an Army Corps permit will be needed and could not lawfully be granted because practical alternatives exist that would accomplish the main purpose of the project – repairing the unsafe highway bridges.

There will be impacts on groundwater and surface water. The CE documentation was based on the erroneous representation that there are no toxic wastes on the site and that there will be no groundwater or surface water impacts. There are toxic wastes on the site, and groundwater and surface water may be affected, as noted above.

Endangered species. The record acknowledged that the project will occur in an area identified as Indiana Bat habitat. Without explaining why, it dismissed this concern. Three years later, as stated by the AoT team to the Select Board at the October 11, 2016 meeting, the extent of the impact and how the impact will be addressed still have not been determined.

There is hazardous, residual or petroleum-related waste in the project area. The administrative record basis for the CE asserted there is not, but AoT's and ANR's files show there is, including benzene.

Adverse impact on historic resources. The CE and other parts of the administrative state that there *will be* visual impact on historic resources. The records that were provided to us under the Public Records Act include no SHPO consultation or sign-off as to these impacts, and also no basis for a § 4(f) *de minimis* determination.

"Neighborhood and Community Concerns;" and "Effect on local business." The CE documentation states there are no neighborhood and community concerns, and that there will be effect on local business other than temporary delays. "Temporary delays" appears to be a reference to traffic delays. The administrative record, and the records of the town's public meetings, demonstrate there are enormous neighborhood and community concern, and potentially devastating effect on local business. The latest plans call for *total closure* of downtown for at least ten weeks. No business owner will have any customers during most of that summer. Many are concerned they will go out of business. One can hardly call this a temporary traffic delay. The October 11, 206 presentation to the Middlebury Selectboard described this ten-week period of total road closure as one that will involve "major traffic impacts." This is an understatement from a layperson's perspective, but it is also a critical concession under NEPA as discussed in the next section below.

According to the October 11, 2016 presentation, there will also be *at least* four years of construction, temporary road closures and during what is otherwise Middlebury's busy tourist season. The four-year estimate of disruption of the downtown is what the AoT team said was the best-case estimate. The best-case scenario assumed that there would be no delays caused by five potential factors – Indiana Bat consultation and mitigation, utility right of way acquisition, bridge safety needs, the risks inherent to accelerated construction

scheduling, and Vermont Railway negotiation. Just one of those factors could extend the four-year best-case scenario to five or six years of construction, temporary road closures and delays. For example, if eminent domain is needed, the schedule would be extended by 18-months to two years; if the landowner prevails, and alternative siting of utilities must be found, there could be more years of delay after construction has started.

4. **The administrative record demonstrates that AoT ignored, and has violated, the governing NEPA regulations.**

The FHWA regulation governing Categorical Exclusions *prohibit* use of CEs where projects involve "Construction of temporary access, or *the closure of existing road, bridge, or ramps, that would result in major traffic disruptions*." No reasonable person would argue that the plans under consideration in 2013 or at present did not and do not involve closure of existing roads and bridges that would result in major traffic disruption. AoT's October 11, 2016 powerpoint presentation admitted exactly that. The latest, allegedly least disruptive, construction schedule calls for ten weeks total closure of Merchants Row and Main Street and at least four years of temporary construction delays. By law, the Categorical Exclusion does not apply; an Environmental Assessment or Environmental Impact Statement must be prepared.

The regulation also prohibits use of Categorical Exclusions where an otherwise excluded type of project would in a particular case have significant environmental impact, as here. See the discussion of "significant" impacts above, applying the CEQ regulations. Even if a Categorical Exclusion were otherwise applicable to bridge repair and reconstruction generally, no Categorical Exclusion would be appropriate in this case. An Environmental Assessment or Environmental Impact Statement must be prepared.

The Categorical Exclusion documentation does not mention, much less apply, either of these components of the FHWA regulations. It was an error of law and arbitrary and capricious for AoT to seek, and for FHWA to authorize, reliance on a Categorical Exclusion.

5. **The record also demonstrates that AoT has ignored, and violated, the FHWA regulations governing § 4(f) de minimis determinations.**

FHWA § 4(f) regulations state that no *de minimis* conclusion can be reached unless there is "no" adverse impact at all on a historic resource. *De minimis* rules are more strict for historic resources than for impacts on other resources. The record demonstrates and acknowledges adverse impact on historic resources. Without referring to the governing regulations, the record concludes that the *de minimis* exception applies. As a result, the finding of no reasonable and prudent alternative was never made. Nor could it be made, because there exist feasible and prudent alternatives that would protect the historic resource.

6. **The record fails to address state and local land use law and plans.**

Whether a proposed project complies with, or would depart from, state and local land use laws and plans is an important factor in determining whether its impacts are significant, as stated above. If a state or local law or plan is preempted, that heightens the need for an EIS. See, for example, the Court of Appeals' decision in Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029, 1036-37 (D.C.Cir. 1973). Projects with significant impacts require preparation of an EIS.

We believe the project requires an operational stormwater permit. ANR has taken the position that this permit is preempted. If ANR is correct, the protections afforded by the program, which protections will not be provided because of preemption, are another factor weighing in favor of preparing an EIS.

We also believe the project requires zoning approval, as argued above. In addition to a permit for use of state-owned land, we now know that the project will involve land use development on two parcels of town-owned land. We believe that those land development requires zoning approval as well. If AoT, the FHWA and/or the Town refrain from submitting to or providing zoning review because of preemption, that would be another factor weighing in favor of preparing an EIS.

7. **The record relies on out of date information.**

The Categorical Exclusion, § 4(f) and NHPA determinations were based on a version of the project that no longer is being proposed. Many important details of the proposed tunnel, of the depth and location of excavation, and of the construction methods and timing have changed. Town-owned lands are now part of the proposed project, with potentially major environmental impacts to those lands and the abutting lands.

8. **Inadequate consideration of alternatives and impacts in the § 106, § 4(f) and NEPA process.**

The discussion of alternatives and of their impacts, in the § 106. § 4(f) and NEPA process is particularly out of date, incomplete and unreasonable.

The July 23, 2013 Alternatives Analysis Report.

VHB Alternatives Analysis Report 7/23/13 states that none of the alternatives considered, including the tunnel alternative, will have *any* natural resource impacts – no impacts on endangered species, or air quality, or groundwater. (VHB Alternatives Analysis Report 7/23/13, p. 4). AoT's and VHB's prior and subsequent reports contradict this conclusion. This was arbitrary and capricious.

The report states that impacts on historic resources would be identical, regardless of whether a tunnel is constructed or the two bridges are reconstructed without the tunnel. (VHB AAR 7/23/13 p.4). However, VHB's own "Resource Identification Report," dated two days later, states on page 8 that the "the loss of view of the tracks between the bridges under the Tunnel Replacement Alternative would result in a potential adverse impact." The public's ability to view the historic Rutland Railroad railroad grade is an important

contributor to the downtown's historic nature and historic designation. The 7/23/13 Alternatives report acknowledges that the tunnel will remove the public's visual access to the historically significant railroad grade if the tunnel is built, but not if the two bridges are replaced. (VHB 7/23/13 p-.28-29).

Nonetheless, the report concludes that the impact on historic resources from the tunnel project is not adverse, as compared to the tunnel project. Why? Because "public support for the Two-Bridge Alternative is considerably less than for the Tunnel Alternative." VHB 7/23/13 pp.28-29. This was arbitrary and capricious.

The alternatives report also failed to consider another reasonable alternative, that of a by-pass around Middlebury. In 2008, studies were initiated for a branch off the VRS to the South of Middlebury. The Middlebury Spur Project's (FHWA-VT-EIS-07-01-F) objective was to establish rail service from the OMYA quarry, eliminate 70,000 truckloads/year from State-maintained roadways, allow expanded production from the OMYA quarry, and improve the economics for both the State and private beneficiaries. The Final EIS was a joint effort of the Federal Highway Administration and VTrans. Twenty alternatives were studied, of which seven were pure rail solutions, and a complete EIS was performed on the best prospects. The Federal and State environmental authorities approved the project. In the course of that study, a northern branch for connection to the VRS near Belden Falls was reviewed extensively as well. The northern branch was planned to follow the ROW established for the Belden's Branch Railroad Company, which was formed in 1870. The ownership of the Belden's Branch Railroad Company's ROW is unknown, but the track bed still exists from Belden Falls to nearly Quarry Road. If the Otter Creek and Belden's Branch ROW's were consolidated, almost 90% of the ROW necessary for a complete rail bypass of Middlebury would be in place and negotiation with landowners to complete the ROW would be limited to only a handful.

The project was delayed following the positive EIS decision, apparently due to the global financial crisis. In 2012, OMYA stated that the project was not currently economic for them.

Based on the 2012 costs for the 3.3 mile Middlebury Spur, it can be reasonably extrapolated that a complete bypass of the Town of Middlebury (7.25 miles) could be constructed for no more and perhaps less than the cost of the tunnel project.

Such a bypass would satisfy 100% of the objectives of the State and Town for the work currently proposed in the heart of the downtown. Furthermore, OMYA's traffic would be removed from the State's highways and the industrial businesses on Case Street would have access to safe, modern freight rail. All of the existing rail customers on Exchange Street would continue to enjoy access to rail. Not a single shipper would lose access. During construction, there would be no disruption to scheduled rail traffic. At conclusion the vitality of the Downtown would improve, real estate values would improve, highway maintenance costs would decrease, large local employers would enjoy improved economics and market access, and the state would upgrade over 10 times the amount of mainline track. It was unreasonable to fail to consider this alternative.

The Section 106 Determination of No Effect.

AoT's and VHB's Section 106 Determination of No Effect, dated 9/6/13, also was arbitrary and capricious. It mentions (p.4) that a Two-Bridge Alternative was addressed in the July 23, 2013 Alternatives report, but in its own discussion of alternatives (pp.5-6) it does not consider the Two-Bridge Alternative. It considers only doing nothing, rehabilitation of the existing bridges, and building in new locations.

The 9/6/13 Determination dismisses rehabilitation of the existing bridges because they can't provide the allegedly necessary vertical clearance. Page 4 refers to the "deficient geometry" of the existing bridges, while pages 5 and 6 approve of the tunnel alternative because all AREMA "standards can be met."

The Determination agrees that the Rutland Railroad corridor is a contributing resource to the Middlebury Village Historic District (p.8) and states that loss of the view of this historic resource may be adverse (pp.11, 14). It also concludes that removal of the existing bridges and retaining walls will be adverse.

Yet, when determining whether the § 4(f) *de minimis* finding can be made, it states that a § 4(f) review will only be needed if the project necessitates acquisition of property outside of the right of way. The Determination does not explain why loss of the view of the historic corridor is not adverse or why there are no prudent and feasible alternatives to that adverse impact. These mandatory subjects are ignored. The FHWA regulations required a determination of whether the chosen alternative was the only prudent and feasible one. That did not occur.

Lack of concurrence by the SHPO

The large record we have reviewed contains no concurrence by the SHPO that there will be no adverse effect, nor any actual consultation with the SHPO. What the record contains instead is internal AoT determinations and concurrences. This does not suffice.

Conclusion

On behalf of my clients, I ask that no contracts be entered into by the Agency of Transportation, the town or the FHWA, and that no construction commence, and that no commitment or decision to go forward with the tunnel project be made until there has been an Environmental Assessment or Environmental Impact Statement, a finding of no prudent and feasible alternative under § 4(f) and the Endangered Species Act, and the NHPA process has been lawfully completed.

We ask that you, the Town, and the Federal Highway Administration update, supplement and correct the record, and reopen and reconsider the NEPA Categorical Exclusion, § 4(f) and NHPA decisions that have been made thus far.

We also ask that I be provided with actual notice, by mail, of all proposed and actual rulings and determinations under NEPA, § 4(f), the NHPA, the Endangered Species Act, and permit programs administered by the Agency of Natural Resources.

Sincerely,

James A. Dumont
James A. Dumont, Esq.

cc: Deborah Markowitz, Secretary of the Agency of Natural Resources
Matthew Hake, Federal Highway Administration
Emily Wadhams, State Historic Preservation Officer
Brian Carpenter, Chair, Middlebury Select Board
H. Curtis Spalding, Region 1 Administrator, Environmental Protection Agency
Wendi Weber, Administrator, Northeast Region, U.S. Fish and Wildlife Service